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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury will be found at pages 50–57 of the record. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 50 F. (2d) 779.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931 (R. 89), and rehearing denied July 22, 1931 (R. 90). The petition for certiorari was filed September 21, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify petitioner's conviction of maintaining a common nuisance in violation of the National Prohibition Act.

2. Whether the District Court erred in its instruction to the jury on the subject of agency.

3. Whether the petitioner's acquittal on the second and third counts of the indictment rendered his conviction on the first count illegal.

STATEMENT

Petitioner was indicted on three counts. The first count charged that on July 4, 1930, petitioner had maintained a common nuisance upon certain premises by there keeping for sale five drinks of whiskey and one drink of beer; the second that at the same time and place he had unlawfully possessed the same liquor, and the third that on June 26, 1930, he had unlawfully sold on the same premises "intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer." (R. 1–2.) Following a trial the jury returned a verdict finding petitioner guilty on the first count and not guilty on the second and third counts. (R. 57.) He was sentenced to imprisonment for one year and to pay a fine of $500. (R. 58.) Upon appeal the judgment was affirmed by the Circuit Court of Appeals (R. 89), which thereafter denied a petition for rehearing (R. 90).

To establish the charges contained in the indictment the Government at the trial called as witnesses Federal Prohibition Agents Osborne and Beam. Osborne testified in substance as follows: At about 7.30 o'clock p. m. on June 26, 1930, the witness, accompanied by Agent Beam and two men unknown to them, visited the premises at 301 Second Street, Eureka, California, which consisted of a room fronting on Second Street in which fishing tackle, sporting goods, cigars, and soft drinks were kept for sale, and a larger room in the rear in which there were pool tables and a bar. Passing through the front room the party entered the rear room, where the witness observed the defendant standing behind the bar. As they walked into this room one of the men with the officers said "Hello, Jim." The party thereupon ordered "three whiskeys and one beer," which were served to them by the defendant. The witness had no doubt that the defendant was the man who served the drinks. The witness was able to tell whiskey by the taste and knew that what was served to him was whiskey. He paid the defendant $1.00 for the four drinks. Shortly thereafter Agent Beam paid fifty cents for two more drinks, one of which was consumed by him and the other by one of the men who accompanied the officers into the place. (R. 17.)

Osborne's testimony was corroborated by that of Agent Beam, who further testified that upon being

paid by Osborne for the first drinks served the defendant rang up the amount on the cash register. (R. 22–24.)

On cross-examination both officers stated that in notes made by them shortly after leaving the premises they had described the defendant as having a missing tooth in his upper jaw, but that they had observed at the trial that he had no missing tooth but a space between two teeth. (R. 18–20, 24–25.)

Taking the stand in his own behalf, the defendant testified that he was the owner of the premises in question; that he was not there at 7.30 o'clock on the evening of June 26, 1930; that he had gone to his ranch at Blocksburg that day and had not returned to his place of business in Eureka until some time between 8.00 and 8.30 o'clock in the evening; that he did not see Agent Osborne and Agent Beam that night or at any other time, so far as he knew, until July 4, 1930, when he saw Agent Osborne. (R. 26.) On cross-examination he stated that he was accompanied on his trip to the ranch by a Mrs. Classen and her child; that in the front room of his place of business he had a cigar store and in the back room two pool tables, four card tables, "and soft drinks of all kinds"; that he had whiskey glasses there "to serve bitters"; that he sold soft drinks at the counter in both the front and back rooms. (R. 27–33.)

Mrs. Florence Classen, called as a witness for the defense, testified that she had been housekeeper for

the defendant since 1926; that on June 26, 1930, she and her child had accompanied the defendant to his ranch, and that they had left the ranch with him about 4.00 o'clock in the afternoon and had arrived in Eureka about 8.00 o'clock. (R. 33–36.)

The defense also called Joe Dunn, who testified that he was a brother of the defendant and was employed by him at the premises in question; that on the evening of June 26, 1930, the defendant was in the place a short time; that the witness did not know the exact time the defendant was there but would judge that it was between 7.00 and 8.00 o'clock; that the defendant did not work behind the bar at any time that evening, and that the witness was there from 6.00 o'clock until midnight of that day and did not see Agent Osborne or Agent Beam or serve them any drinks. (R. 36–37.) The witness further testified that he was in the place on the evening of July 4, 1930, at which time he was placed under arrest after an agent who read a John Doe warrant to him had asked whether he had a tooth missing; that the defendant came in while the agents were there and said, "I guess I am the man you are looking for"; whereupon the agents said that they would have to hold both until they were identified, and that Agent Osborne later appeared and identified the defendant as the man to be arrested. (R. 37–38.)

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF MAINTAINING A COMMON NUISANCE

Petitioner first contends that if the evidence showed that he was maintaining a common nuisance on the premises in question, it showed the maintenance of such nuisance on June 26, 1930, and not on July 4, 1930, the date charged in the indictment, and that the District Court erred, therefore, in denying motions for a directed verdict based on this ground. (R. 25–26, 47, 48.) We submit that this variance between the proof and the indictment was immaterial. It is well settled that unless a particular day is made material by the statute creating the offense, the evidence need show only that the offense was committed at some time within the period of the statute of limitations. *Ledbetter* v. *United States,* 170 U. S. 606, 612.

Petitioner next asserts that the evidence was insufficient to establish the offense of maintaining a common nuisance, because it disclosed only a single sale of liquor. The contention was not raised in the motions for a directed verdict (R. 25–26, 47, 48), but was apparently made for the first time by motion in arrest of judgment (R. 13–14). We believe that it was raised too late, but in any event the question presented by the motion in arrest of judgment was one addressed to the discretion of the trial court and can not be reviewed if there was any evi-

dence proper to go to the jury in support of the verdict. See *Crumpton* v. *United States*, 138 U. S. 361, 362–363; *Moore* v. *United States*, 150 U. S. 57, 61–62. We submit that there was sufficient evidence to support the verdict on the nuisance count. Even if the sale by petitioner of the four drinks of liquor paid for by Agent Osborne, followed by the sale by him of the two drinks paid for by Agent Beam, may be regarded as constituting a single sale of liquor, nevertheless the circumstances under which the sale was made, that is, the readiness with which the petitioner, upon being greeted by name by one of the party, furnished the liquor in whiskey glasses across the bar in a rear room, coupled with his ringing up the amount of the sale on the cash register (R. 17, 23–24), were ample, we think, to justify the jury in concluding that the sale was but an instance of a practice which was being regularly carried on in that room. That a single sale of liquor may be made under such circumstances as to warrant a conviction of maintaining a common nuisance is settled. *Fisher* v. *United States*, 32 F. (2d) 602, 604 (C. C. A. 4th), and cases therein cited. Petitioner refers to no decision in conflict.

II

THE INSTRUCTION ON THE SUBJECT OF AGENCY IS NOT OPEN TO THE OBJECTIONS ASSERTED BY PETITIONER

In the course of its charge to the jury the District Court gave the following instruction (R. 54):

> The familiar rule of the civil law that a person is held to be responsible for the act

> of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the Act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

Petitioner attacks this instruction on two grounds, the first being that there was no evidence that any agent of the petitioner sold liquor on the premises and the charge tended, therefore, to confuse the jurors as to the issues to be decided by them.

It is true that the Government's witnesses testified that the sales of liquor were made by the petitioner himself rather than by an agent. But the evidence introduced by the defense to show that the petitioner was not present when the sales were made might well have led the jury to conclude that, although the Government agents truthfully testified that sales of liquor were made on the premises, they were mistaken in their identification of the bar-

tender. As the circumstances under which the sales were made were such as to justify the jury in finding that, if not made by the petitioner, they were made by one employed by him to make sales of that character, an instruction by the court regarding the petitioner's responsibility in that event was clearly justified.

Petitioner's second ground of attack upon the instruction is that it constituted an incorrect statement of the law, in that it failed to charge that the principal must have knowledge of the act of the agent in order to be held accountable therefor. If this contention means that the principal in order to be liable criminally for the acts of an agent must have specific knowledge of each particular act, we submit that it is a too narrow interpretation of the law. Indeed, the quotation from *Dandrea* v. *United States,* 7 F. (2d) 861, 862 (C. C. A. 8th), which petitioner gives on page 18 of his brief, specifically states that criminal liability attaches to the principal where sales are made "on his behalf and as part of his business, and under such circumstances that he must be held to know that such sales were being made." The instruction to which petitioner objects not only charges that the act must have been "committed in the course of the agency and in furtherance of it," which obviously means that the act must have been done pursuant to authority conferred by the principal, but it was followed imme-

diately by a paragraph of the charge, which in referring to Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) instructed as follows (R. 55):

> I instruct you, Gentlemen, that it is the law that "Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal." Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in the commission of an offense. *The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal.* (Italics ours.)

In addition, the trial court, in ruling upon petitioner's exception to the instruction, specifically stated (R. 56):

> The COURT. As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows some one was selling liquor there he would be responsible for the act of that agent, whoever that would be.

We submit that petitioner's contention is without merit, and that upon the charge as a whole the jury could not have been under a misapprehension as to the law applicable to the facts.

III

PETITIONER'S ACQUITTAL ON THE SECOND AND THIRD COUNTS DID NOT RENDER ILLEGAL HIS CONVICTION ON THE FIRST COUNT

Petitioner's final contention is that his conviction on the charge of maintaining a common nuisance was inconsistent with his acquittal on the charges of having possessed and sold liquor, and that the decision of the court below is in conflict with decisions of other Circuit Courts of Appeals holding that a conviction will be set aside where it is inconsistent with an acquittal on another count of the same indictment.

The court below recognized in this and the earlier cases which it cites (see e. g. *Lambert* v. *United States*, 26 F. (2d) 773) that there is a diversity of opinion among some of the circuits as to the effect of an inconsistent verdict, where there are different counts in the same indictment or information (R. 82), but it held that neither line of decisions applied in the instant case because the verdict was not inconsistent. It said (R. 83–84, 86):

> In the case at bar there is no legal inconsistency between an acquittal upon the charges of sale and possession and the conviction upon a charge of nuisance. The inconsistency, if any, arises from the fact that the evidence on behalf of the Government with reference to the three offenses is identical, and it is illogical for a jury to accept the testimony of these witnesses on one count

and reject them on the other two. But this apparent inconsistency is largely dispelled by a consideration of the evidence offered by the defense. This evidence was calculated to, and no doubt did, raise a reasonable doubt in the minds of the jury as to whether or not the defendant personally sold the liquor to the Government agents at the time and place in question. In view of the fact that the jury was instructed that the appellant might act through agents and employees and was instructed in effect that if he so acted through an agent or employee in possession or sale of liquor he was guilty as a principal of the illegal sale and illegal possession, the effect of the verdict is that the jury had a reasonable doubt as to whether or not the person who sold the liquor at the time and place in question was acting as the agent for and under the authority of the appellant. The evidence showed that appellant had several employees, including his brother, operating his place of business. The verdict of the jury on the first count shows that they are satisfied beyond a reasonable doubt that the premises were kept and maintained and liquor was there possessed for purposes of illegal sale, and while they are not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of the appellant, they were convinced that the appellant kept the liquor there for the purpose of sale. As pointed out in *U. S. v. Anderson*, *supra* (31 F. (2d)

436), it is not the province of this court to try to determine the basis for the verdict of the jury. Under our system of law the jury is the sole judge of the facts and the credibility of witnesses and their verdicts are not to be overturned because them seem illogical.

* * * * *

The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts.

Obviously, in reaching a verdict of guilty on the first count it was not necessary for the jury to identify the bartender either as the defendant or as one regularly employed on the premises, or, perchance, one of the patrons of the place who might have stepped behind the bar to take the bartender's place. The evidence clearly established that liquor was there for sale, that it was sold in the ordinary course of business, and that the proceeds of the sales went into the cash register. The defendant was the proprietor of this place. Upon the

evidence the jury was justified in finding the defendant guilty of maintaining the place for such purposes without attempting to identify the particular individual who made the sale. On the other hand in considering the counts charging possession and sale, it was necessary for the jury to find either that the defendant himself made the sale or that the sale was made by his authorized agent. Thus, the evidence supported conviction on the first count for maintaining a nuisance, even though the jury was unable to identify the person who actually made the sale.

The cases upon which petitioner relies are all distinguishable because conviction on one count necessarily depended on the evidence which the jury did not accept in reaching verdicts of acquittal on other counts. The conflict of decisions to which the court below referred and upon which the petitioner relies comes merely to this: That some courts have held that evidence showing sales of which the defendant has been acquitted can not be relied upon to support conviction of maintaining a nuisance, whereas other courts have held that even if there is no rational way to reconcile such verdicts the verdict of guilty will stand. Obviously upon this record it was not only possible to reconcile the verdict of the jury by a rational consideration of the evidence, but there was, in fact, no inconsistency between a finding of guilty upon the first count and the acquittal upon the other two counts. Under these circumstances the court below

was clearly right in pointing out that neither line of the conflicting decisions could have application to this case, because the verdict was not in fact inconsistent. It follows that no conflict of decisions is presented.

CONCLUSION

The questions presented are of no general importance, and have application only to the particular state of the proofs in this case. There is no such conflict of decisions arising in this case as requires the exercise of this Court's supervisory power. The petition, accordingly, should be denied.

Respectfully submitted.

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